
No. 07-4182

United States Court of Appeals
for the Sixth Circuit

JOHN DOE,

Plaintiff-Appellant

v.

SEXSEARCH.COM, et al.

Defendants-Appellees

On Appeal from the United States District Court
for the Northern District of Ohio

BRIEF OF *AMICI CURIAE*
CENTER FOR DEMOCRACY & TECHNOLOGY
AND ELECTRONIC FRONTIER FOUNDATION
SUPPORTING APPELLEES AND URGING AFFIRMANCE

Michael B. Bressman
VANDERBILT LEGAL CLINIC
131 21st Avenue South
Nashville, Tennessee 37203
(615) 322-4964

Attorney for Amici Curiae

March 28, 2008

TABLE OF CONTENTS

	<u>Page (s)</u>
TABLE OF AUTHORITIES	iv
STATEMENTS OF INTEREST OF <i>AMICI CURIAE</i>	vii
STATEMENT OF SOURCE OF AUTHORITY TO FILE BRIEF	viii
SUMMARY OF ARGUMENT	1
ARGUMENT	4
I. CONGRESS ENACTED SECTION 230 TO FOSTER FREE SPEECH AND DISSEMINATION OF INFORMATION AND TO PROMOTE THE DEVELOPMENT OF THE INTERNET	7
II. THIS COURT SHOULD ADOPT THE POSITION OF THE VAST MAJORITY OF THE COURTS AND HOLD THAT SECTION 230(c) BROADLY IMMUNIZES WEBSITE OPERATORS SUCH AS SEXSEARCH FROM LIABILITY FOR DISSEMINATING CONTENT CREATED BY A THIRD PARTY	10
A. Section 230 Immunity Applies Regardless of the Design of a Website, the Type of Information Solicited, or the Success of the Methods Used to Screen Objectionable Third-Party Content	13
B. Section 230 Immunizes a Website Operator from Any State or Federal Claim, Not Only Tort Claims, Which Attempts to Treat It as the Publisher of Objectionable Third-Party Content	19
III. THIS COURT SHOULD REJECT DICTA AND HYPOTHETICALS FROM A SMALL MINORITY OF CASES ATTEMPTING TO LIMIT THE BROAD IMMUNITY PROVIDED BY SECTION 230	23
CONCLUSION	28
CERTIFICATE OF COMPLIANCE	30
CERTIFICATE OF SERVICE	31

TABLE OF AUTHORITIES

Cases

<i>ACLU v. Reno</i> , 929 F. Supp. 824 (E.D. Pa. 1996).....	5, 6
<i>Am. Library Ass’n, Inc. v. United States</i> , 201 F. Supp. 2d 401 (E.D. Pa. 2002), <i>rev’d on other grounds</i> , 539 U.S. 194 (2003).....	6
<i>Barrett v. Rosenthal</i> , 146 P.3d 510 (Cal. 2006).....	17
<i>Batzel v. Smith</i> , 333 F.3d 1018 (9th Cir. 2003)	12
<i>Ben Ezra, Weinstein, and Co. v. America Online, Inc.</i> , 206 F.3d 980 (10th Cir. 2000)	12, 16, 27
<i>Blumenthal v. Drudge</i> , 992 F. Supp. 44 (D.D.C. 1998).....	15
<i>Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.</i> , 331 U.S. 519 (1947)	25
<i>Carafano v. Metrosplash.com, Inc.</i> , 339 F.3d 1119 (9th Cir. 2003)	12, 14, 15, 16
<i>Chicago Lawyers’ Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc.</i> , No. 07-11-1, 2008 WL 681168 (7th Cir. Mar. 14, 2008).....	24, 25
<i>Corbis Corp. v. Amazon.com, Inc.</i> , 351 F. Supp. 2d 1090 (W.D. Wash. 2004)	21
<i>Doe v. America Online</i> , 783 So.2d 1010 (Fla. 2001).....	27
<i>Doe v. GTE Corp.</i> , 347 F.3d 655 (7th Cir. 2003)	24, 25
<i>Doe v. MySpace, Inc.</i> , 474 F. Supp. 2d 843 (W.D. Tex. 2007).....	19, 20
<i>Doe v. SexSearch.com</i> , 502 F. Supp. 2d 719 (N.D. Ohio 2007).....	3, 22, 23
<i>Fair Housing Council of San Fernando Valley v. Roommates.com, LLC</i> , 489 F.3d 921, <i>reh’g granted</i> , 506 F.3d 716 (9th Cir. 2007).....	26
<i>Gentry v. eBay, Inc.</i> , 121 Cal. Rptr. 2d 703 (Cal. Ct. App. 2002).....	15, 20

<i>Green v. America Online, Inc.</i> , 318 F.3d 465 (3rd Cir. 2003)	12, 17, 18, 21
<i>Mazur v. eBay, Inc.</i> , No. C 07-03967 MHP, 2008 WL 618988 (N.D. Cal. Mar. 3, 2008).....	22
<i>Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.</i> , 545 U.S. 913 (2005)	26
<i>Negonsott v. Samuels</i> , 507 U.S. 99 (1993)	12
<i>Reno v. ACLU</i> , 521 U.S. 844 (1997).....	4, 5
<i>Schneider v. Amazon.com, Inc.</i> , 31 P.3d 37 (Wash. Ct. App. 2001)	17, 21
<i>Stratton Oakmont, Inc. v. Prodigy Servs. Co.</i> , No. 031063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).....	9
<i>Universal Commc'n Sys. v. Lycos, Inc.</i> , 478 F.3d 413 (1st Cir. 2007).....	<i>passim</i>
<i>Zeran v. America Online, Inc.</i> , 129 F.3d 327 (4th Cir. 1997)	<i>passim</i>

Statutes

47 U.S.C. § 230(a)	7, 25
47 U.S.C. § 230(b)	7, 25, 26
47 U.S.C. § 230(c)	<i>passim</i>
47 U.S.C. § 230(c)(1)	<i>passim</i>
47 U.S.C. § 230(c)(2)	<i>passim</i>
47 U.S.C. § 230(d)(3)	22
47 U.S.C. § 230(e)	10, 19, 26
47 U.S.C. § 230(f)(2)	8
47 U.S.C. § 230(f)(3)	8

47 U.S.C. § 941(e)(1)27

Other Authorities

141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) 9

141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995)8

HR Rep. No. 107-449 (2002).....27

STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Center for Democracy & Technology (“CDT”) is a non-profit public interest and Internet policy organization. CDT represents the public’s interest in an open, decentralized Internet reflecting constitutional and democratic values of free expression, privacy and individual liberty. CDT has litigated or otherwise participated in a broad range of Internet free speech cases, and works to protect the ability of websites and other service providers to offer new opportunities for online speech unfettered by government regulation or censorship.

The Electronic Frontier Foundation (“EFF”) is a non-profit, member-supported civil liberties organization that works to protect rights in the digital world. EFF encourages and challenges industry, government and the courts to support free expression, privacy, and openness in the information society. It is particularly concerned that laws and regulations not be used to stifle free expression on the Internet by holding intermediaries liable where the content in question originates with a third party.

CDT and EFF have a substantial interest in this case because it concerns issues related to intermediary liability and free speech on the Internet. Specifically, CDT and EFF support a broad interpretation of Section 230 of the Communications Decency Act because this statute has played a vital role in allowing millions of people to create and disseminate user-generated content

through the Internet, enriching the diversity of offerings online. Both CDT and EFF have participated in a number of cases addressing the interpretation of this statute.

STATEMENT OF SOURCE OF AUTHORITY TO FILE BRIEF

Pursuant to Federal Rule of Appellate Procedure 29(b), CDT and EFF have filed contemporaneously with the filing of this Brief of *Amici Curiae*, a motion for leave of this court for permission to file this Brief. Appellees have consented to the filing of this Brief.

SUMMARY OF ARGUMENT

In recent years, the Internet has grown exponentially both in the number of users and the diversity and quantity of websites, including vast social-networking sites such as MySpace, Facebook, and Flickr; video sites such as YouTube; business sites such as Craigslist, eBay, and Amazon; and political and social commentary sites such as blogs. Each of these sites, and countless others, share one thing in common – they rely on and encourage users to create a wide range of content and information to be shared through these sites. The Internet’s phenomenal development, which permits millions of people on a daily basis to freely express themselves and communicate, would not have been possible without Section 230 of the Communications Decency Act (“Section 230”). Congress enacted Section 230 to protect “interactive computer services” such as SexSearch in two ways. First, Section 230(c)(1) immunizes interactive computer services from liability from legal claims that would *treat* them as publishers or speakers of a third party’s content. Second, Section 230(c)(2) immunizes them from liability for any good faith efforts to screen or block objectionable third-party content. Since its enactment, courts have almost uniformly held that Section 230(c) broadly immunizes website operators such as SexSearch from any liability for content provided by users, reaffirming the statute’s importance in fostering diverse and innovative communications online.

This case represents an attempt to circumvent Section 230's protections and hold a website operator liable for content created and provided by a user. Appellees SexSearch.com, et al. ("SexSearch") operate an adult dating service through which members meet and may subsequently engage in sexual relationships. To use SexSearch's website and services, a member fills out an online profile and must check a box certifying that the person is 18 or older and has read and agreed to SexSearch's Terms and Conditions ("Terms"). (R.1, Compl. ¶¶ 106, 149, 183, 192) SexSearch's Terms reiterate the age requirement, warn that the use of the website is "at your sole risk," and expressly disclaim all warranties. (R.117, Defs. Mot. Dismiss, Ex. A, ¶ 15) Furthermore, the Terms affirm that SexSearch "cannot guarantee, and assume[s] no responsibility for verifying, the accuracy of information provided by other users[.]" (*Id.* Ex. A. ¶ 17)

Appellant John Doe ("Doe") met Jane Roe ("Roe"), a 14-year-old female, through SexSearch's website. Roe had falsely certified and claimed on her profile that she was 18 years old. Doe and Roe, after communicating through SexSearch, eventually met in person and had intercourse. Doe was arrested and faced criminal charges, which were subsequently dismissed. Doe nevertheless sued SexSearch under a host of tort, breach of contract, and statutory consumer protection claims, each of which is in reality an attempt to plead around Section 230 and hold SexSearch responsible for Roe's false age content. The district court rightly

rejected all the claims. *Doe v. SexSearch.com*, 502 F. Supp. 2d 719, 728, 737 (N.D. Ohio 2007).

This court should join the nearly uniform view of other courts that Section 230(c)(1) provides broad and robust immunity for interactive computer services such as SexSearch from any liability for content created by users such as Roe. This broad immunity is essential to promote free speech and the continued development of user-generated content on the Internet. This court should also declare that broad immunity attaches regardless of how the provider structures its website, whether it solicits or encourages certain types of content, or whether it edits or modifies a user's content. Indeed, this protection has permitted website operators to experiment with dynamic site formats that have fueled the wide variety of speech and user-generated content now common on the Internet. Section 230 immunity will allow the development of the next generation of unique Internet experiences and possibilities – ones that doubtless were unimaginable even a few years ago. It is this freedom to create, speak, and experiment that Congress sought to encourage and protect through Section 230.

Moreover, this court should join the uniform view of other courts that interactive computer services shall not be held liable for voluntary good faith efforts to screen or block third-party content, even if the screening efforts are incomplete or unsuccessful. Section 230(c)(2) immunity applies even if a website

adopts rules or guidelines to block objectionable content but fails to enforce them; otherwise, the website operator would be better off not attempting to adopt rules in the first place. Congress wanted to remove any disincentives to interactive computer services implementing voluntary actions to screen objectionable content.

Congress knew that attempts to hold interactive computer services liable for third-party content would come in many forms – torts, contracts, and conflicting state laws. It drafted Section 230 to apply to *all* civil actions seeking to treat an interactive computer service as a publisher of another’s content, regardless of the form of the legal claim. With this broad immunity against all civil claims, Section 230 has successfully promoted free speech and innovations on the Internet. Thus, this court should affirm the district court’s opinion and reject any efforts by Doe to circumvent this broad immunity.

ARGUMENT

The Internet is arguably the most important technological advance in communications and the spread of information in the history of mankind. The Internet “enable[s] tens of millions of people to communicate with one another and to access vast amounts of information from around the world.” *Reno v. ACLU*, 521 U.S. 844, 850 (1997). It makes every person a potential citizen-journalist. It is revolutionizing politics, business, education, and virtually every other human endeavor. “At any given time ‘tens of thousands of users are engaging in

conversation on a huge range of subjects.’ It is ‘no exaggeration to conclude that the content on the Internet is as diverse as human thought.’” *Id.* at 852 (citing the findings of the district court). The Supreme Court has noted that the “Web is thus comparable, from the readers’ viewpoint, to both a vast library including millions of readily available and indexed publications and a sprawling mall offering goods and services.” *Id.* at 853. Moreover, from “the publishers’ point of view, it constitutes a vast platform from which to address and hear from a worldwide audience of millions of readers, viewers, researchers, and buyers.” *Id.*

The Internet promotes all forms of speech and permits any speaker, regardless of power, status, race, gender, nationality, disability, or any other societal barrier, to participate in a worldwide discourse. One of the most significant aspects of the Internet is that it is considered a great equalizer because every speaker has a digital microphone. “[T]he Internet has achieved, and continues to achieve, the most participatory marketplace of mass speech that this country—and indeed the world—has yet seen. . . . [I]ndividual citizens of limited means can speak to a worldwide audience of issues of concern to them.” *ACLU v. Reno*, 929 F. Supp. 824, 879-80 (E.D. Pa. 1996). As the Supreme Court observed: “Any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox.” *Reno*, 521 U.S. at 870.

Furthermore, the Internet permits vast quantities of information to be disseminated quickly and broadly. “[W]hereas the architecture of real space limits the audience of a pamphleteer or soapbox orator to people within the speaker’s immediate vicinity, the Internet renders the geography of speaker and listener irrelevant.” *Am. Library Ass’n, Inc. v. United States*, 201 F. Supp. 2d 401, 468 (E.D. Pa. 2002), *rev’d on other grounds*, 539 U.S. 194 (2003). Speech via the Internet is “significantly more interactive than the broadcast media and the press.” 201 F. Supp. at 468 n.27. Unquestionably, the “extraordinary growth of the Internet illustrates the extent to which the Internet promotes First Amendment values[.]” *Id.* at 469.

Inevitably, when millions of people are speaking, some of that speech will be objectionable. Given the vast quantities of Internet speech, it is impossible for website operators and service providers to know all of the content and information that passes through their sites and services, let alone monitor or screen it. Preserving the Internet’s openness – specifically, the ability of interactive computer services to host user-created information without liability – protects citizens’ rights by promoting free speech and fostering innovation in the creation of new forums for speech. Consequently, “[a]s the most participatory form of mass speech yet developed, the Internet deserves the highest protection from government intrusion.” *ACLU*, 929 F. Supp. at 883.

I. CONGRESS ENACTED SECTION 230 TO FOSTER FREE SPEECH AND DISSEMINATION OF INFORMATION AND TO PROMOTE THE DEVELOPMENT OF THE INTERNET.

At the time Congress enacted Section 230, interactive computer services and website operators were already facing lawsuits attempting to hold them liable for objectionable third-party content. The specter of liability for the speech and activities of millions of users risked chilling speech. *See Zeran v. America Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997). Congress passed Section 230 in response to this threat.

Congress found that the Internet “offer[s] a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activities.” 47 U.S.C. § 230(a)(3). The text of the CDA evinces Congress’s goals and purposes to promote this free speech forum and the continued growth of the Internet: “It is the policy of the United States—to promote the continued development of the Internet and other interactive computer services and other interactive media; [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” 47 U.S.C. § 230(b)(1)-(2).

Congress adopted Section 230(c) to foster free speech and the continued development of the Internet. Section 230(c) delineates two separate approaches to meet these goals. First, Section 230(c)(1) establishes that “[n]o provider or user of

an interactive computer service shall be *treated* as the publisher or speaker of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1) (emphasis added).¹ Internet service providers and website operators are “interactive computer services.” See *Universal Commc’n Sys. v. Lycos, Inc.*, 478 F.3d 413, 419 (1st Cir. 2007). As Representative Goodlatte explained:

We have the opportunity for every household in America, every family in America . . . to have access to places like the Library of Congress . . . to other major libraries of the world, universities, major publishers of information, news sources. There is no way that any of those entities . . . can take the responsibility to edit out information that is going to be coming in to them from all manner of sources We are talking about something that is far larger than our daily newspaper. We are talking about something that is going to be thousands of pages of information every day, and to have that imposition imposed on them is wrong. This will cure that problem[.]

141 Cong. Rec. H8471 (daily ed. Aug. 4, 1995). In other words, Congress decided that liability for objectionable material would not lie with interactive computer services but rather with the third-party creators of the content.

Second, Section 230(c)(2) provides that “[n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to or availability of material the

¹ Section 230(f)(2) defines an “interactive computer service” as “any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server[.]” 47 U.S.C. § 230(f)(2). Section 230(f)(3) defines an “information content provider” as “any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the Internet or any other interactive computer service.” 47 U.S.C. § 230(f)(3).

provider or user considers to be . . . objectionable[.]” 47 U.S.C. § 230(c)(2)(A). Congress enacted this provision to counter cases that punished providers that screened, blocked, or monitored objectionable material. *See, e.g., Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 031063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995). Before Section 230, courts had treated such voluntary monitoring and self-regulation as notice to service providers that objectionable content was being carried on their websites, and thus as a ground for potential liability. As one of the chief sponsors of Section 230 stated, “it will protect computer Good Samaritans, online service providers, anyone who provides a front end to the Internet . . . who takes steps to screen indecency and offensive materials for their customers. It will protect them from taking on liability . . . that they should not face for helping us and for helping us solve the problem.” 141 Cong. Rec. H8470 (daily ed. Aug. 4, 1995) (statement of Rep. Cox). Thus, Congress enacted Section 230(c) for two distinct purposes: to shield providers from liability for carrying objectionable third-party content and to promote self-regulation efforts to prevent such material from passing through their websites. Congress thereby ensured that the growth of the Internet would not be stifled by lawsuits over third-party content.

Since its passage, Section 230 has been an absolutely critical underpinning of the astounding explosion of new ways Internet users can express themselves

online. During the past five years alone, the Internet has seen the emergence of a broad range of user-generated content sites, from video-sharing sites like YouTube to dynamic social-networking sites like Facebook. Websites such as these, which allow millions of users to express themselves to the entire world, could not exist without the protections of Section 230. This provision is the single most important legislative enactment fostering diverse and innovative communications online.

II. THIS COURT SHOULD ADOPT THE POSITION OF THE VAST MAJORITY OF THE COURTS AND HOLD THAT SECTION 230(c) BROADLY IMMUNIZES WEBSITE OPERATORS SUCH AS SEXSEARCH FROM LIABILITY FOR DISSEMINATING CONTENT CREATED BY A THIRD PARTY.

As noted above, Section 230 expressly declares that “[n]o provider . . . of an interactive computer service shall be *treated* as the publisher of any information provided by another information content provider.” 47 U.S.C. § 230(c)(1) (emphasis added). This declaration is not qualified in any manner.² Section 230(c) does not consider what type of information the content provider has supplied. It also does not consider the manner in which the information has been provided by a third party. Significantly, Section 230(c)(1) does not qualify treatment based on what steps the interactive computer service did or did not take to prevent, monitor, or screen third-party content. The only relevant issue is who created the

² Section 230(e) lists certain categories, such as intellectual property and federal criminal laws, which are not affected or preempted by Section 230.

information: Was it the interactive computer service or an information content provider?

Given this unqualified declaration, it is hardly surprising that the vast majority of courts interpreting Section 230(c)(1), including the First, Third, Fourth, Ninth, and Tenth Circuit Courts of Appeals, have construed it to broadly immunize website operators such as SexSearch from liability for disseminating third-party content. The Fourth Circuit, in the first circuit court decision interpreting Section 230, stated: “By its plain language, § 230 creates a federal immunity to *any cause of action* that would make service providers *liable for information originating with a third-party user* of the service.” *Zeran*, 129 F.3d at 330 (emphasis added).

Quoting Congress’s statutory findings, the court explained:

Congress’ purpose in providing the § 230 immunity was thus evident. Interactive computer services have millions of users. . . . The amount of information communicated via interactive computer services is therefore staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems. Faced with potential liability for each message republished by their services, interactive computer service providers might choose to severely restrict the number and type of messages posted. Congress considered the weight of the speech interests implicated and chose to immunize service providers to avoid any such restrictive effect.

Id. at 331 (citation omitted). The Fourth Circuit further noted that “Congress made a policy choice . . . not to deter harmful online speech through the separate route of imposing tort liability on companies that serve as intermediaries for other parties’

potentially injurious messages.” *Id.* at 330-31. Indeed, Congress left liability where it belonged – with the third-party creators of the objectionable information. *Id.* at 330.

In the 11 years since the *Zeran* decision, four other circuit courts have likewise held that Section 230(c)(1) grants interactive computer services broad and robust immunity from liability for third-party content. *See, e.g., Universal Commc’n Sys.*, 478 F.3d at 419 (“[W]e too find that Section 230 immunity should be broadly construed.”); *Carafano v. Metrosplash.com, Inc.*, 339 F.3d 1119, 1123 (9th Cir. 2003) (noting that the Ninth Circuit, in *Batzel v. Smith*, 333 F.3d 1018 (9th Cir. 2003), “joined the consensus . . . of other courts of appeals that § 230(c) provides broad immunity”); *Green v. America Online*, 318 F.3d 465, 471 (3rd Cir. 2003); *Ben Ezra, Weinstein, and Co. v. America Online, Inc.*, 206 F.3d 980, 984-85 (10th Cir. 2000). Courts thus have construed Section 230(c)(1) broadly to “‘give effect to the will of Congress[.]’” *Id.* at 984 (quoting *Negonsott v. Samuels*, 507 U.S. 99, 104 (1993)). Applying the broad and robust immunity of Section 230(c)(1) to the present case, this court should hold that SexSearch is not liable in any way for the false age information created and provided by Roe.

A. Section 230 Immunity Applies Regardless of the Design of a Website, the Type of Information Solicited, or the Success of the Methods Used to Screen Objectionable Third-Party Content.

Doe, despite his denials, seeks to hold SexSearch responsible for Roe’s false age information. (Appellant Br. 15; R. ¶¶ 290-355, 390-96) Specifically, he implies that the structure and design of SexSearch’s website encouraged Roe’s access to the website and her provision of false age information. (Appellant Br. 6, 15) This court should reject any effort to limit broad Section 230 immunity based on website design, the type of information requested, or the editorial or self-regulatory functions exercised by a website operator. Rather, the Sixth Circuit should join the other circuit courts by following the plain language of Section 230 and proclaiming that a website operator shall not be liable for the delivery of objectionable or inaccurate third-party content.

Courts have held with near unanimity that an interactive computer service provider does not become an information content provider based on the structure or format of its website or on whether it solicits or encourages certain types of content. For example, in *Universal Communications Systems v. Lycos, Inc.*, the plaintiff attempted to hold Lycos, an owner of various websites, liable for false stock information posted on a message board. The plaintiff argued that Lycos had notice of the illegal information and that certain features of the message board made “it possible for individuals to spread misinformation more credibly.” 478

F.3d at 420. The First Circuit rejected this argument, holding that “[i]f the cause of action is one that would treat the service provider as the publisher of a particular posting, immunity applies not only for the service provider’s decision with respect to that posting, but also for its inherent decisions about how to treat postings generally.” *Id.* at 422. The court elaborated that even if the construct and operation of a website makes it “marginally easier for others to develop and disseminate misinformation,” this fact “is not enough to overcome Section 230 immunity.” *Id.* at 420.

Similarly, in *Carafano v. Metroplash.com, Inc.*, the plaintiff sought to hold Metroplash.com, the operator of a social networking website, liable because “some of the content was formulated in response to . . . [a] questionnaire” that “facilitated the expression of information by individual users.” 339 F.3d at 1124. Like Roe in the instant case, the third party in *Carafano* used a website’s online questionnaire that provided pre-prepared responses to create a false profile. *Id.* Also, similar to SexSearch.com, the website classified content into categories and structured user-generated information to facilitate profile searching and “matching.” *Id.* at 1124-25. The false profile generated in *Carafano* caused the plaintiff to face serious harassment and embarrassment. Nonetheless, the Ninth Circuit held that “[u]nder § 230(c) . . . so long as a third party willingly provides the essential published content, the interactive service provider receives full

immunity regardless of the specific editing or selection process.” *Id.* at 1124; *see also Gentry v. eBay, Inc.*, 121 Cal. Rptr. 2d 703, 717-18 (Cal. Ct. App. 2002) (holding that Section 230 barred negligence claims based on eBay’s highly structured feedback forum); *Blumenthal v. Drudge*, 992 F. Supp. 44, 50-53 (D.D.C. 1998) (holding that Section 230 immunity applied even though AOL contracted with Drudge to provide the allegedly defamatory information with full awareness of his reputation for unsubstantiated gossip).

These cases highlight how broad Section 230(c) immunity fosters freedom of speech and the development of the Internet. Without broad immunity, interactive computer services would lack the freedom to structure their websites in any way they want and to solicit and encourage user-generated content. They would run a high risk of being *treated* as publishers of objectionable third-party content and face liability for it. Broad immunity has allowed the flexibility for the eBays, Amazons, MySpaces, and blogs of the world to create unique sites that encourage the sharing and development of content, information, and speech by their users. It has also permitted the development of consumer criticism (“gripe”) sites, political discussion sites, and countless other sites such as SexSearch.com, which some may classify as objectionable. This court should embrace the pro-speech and pro-Internet approach to Section 230(c)(1) enunciated in *Zeran* and its progeny by holding that SexSearch is not liable for the false age information

created by Roe, regardless of SexSearch's website design or questionnaire used, because SexSearch is not the "developer" of Roe's "underlying misinformation." *Carafano*, 339 F.3d at 1124.

Doe also argues that SexSearch should not receive Section 230(c) immunity because it reserves the right to modify objectionable content in the profiles of its users when the content does not meet SexSearch's profile standards. (Appellant Br. 14) This is yet another attempt to hold SexSearch liable for Roe's false content, and courts have repeatedly and rightfully rejected such arguments. The Sixth Circuit likewise should reject this effort to treat SexSearch as the publisher of Roe's content.

Importantly, Doe does not claim that SexSearch modified Roe's false age content. Because the content at issue was not modified by SexSearch, SexSearch cannot be considered an information content provider in the present case. *See Ben Ezra, Weinstein & Co.*, 206 F.3d at 986 (barring liability where AOL did not modify third-party content). More important, the decision by a website operator such as SexSearch whether to modify, screen, or remove objectionable content represents the exercise of a publisher's traditional editorial functions, a free speech role that Congress intended to immunize through Section 230. *See Zeran*, 129 F.3d at 330 ("[L]awsuits seeking to hold a service provider liable for its exercise of

a publisher's traditional editorial functions – such as deciding whether to publish . . . –are barred.”).

Courts have likewise held that Section 230 immunizes an interactive computer service provider's decision *not* to exercise its reserved right to edit, screen, or block content. *See Schneider v. Amazon.com, Inc.*, 31 P.3d 37, 42 (Wash. Ct. App. 2001) (noting that Amazon's right to edit users' postings did not bar a Section 230 defense); *Green*, 318 F.3d at 471 (holding that Section 230 immunized AOL against a claim for failure to block transmission of a harmful computer program through its service because such decisions constitute “actions quintessentially related to a publisher's role”); *Barrett v. Rosenthal*, 146 P.3d 510, 518 (Cal. 2006) (holding the claim that eBay “knew or should have known about the sellers' illegal conduct but failed to prevent it by withdrawing or altering the fraudulent content” was preempted by Section 230). Moreover, a website operator such as SexSearch is under no duty to modify its website policies to abate the dissemination of misinformation because “[a] decision not to reduce misinformation by changing . . . web site policies [is] as much an editorial decision . . . as a decision not to delete a particular posting.” *Universal Commc'n Sys.*, 478 F.3d at 422.

Additionally, all courts have held that Section 230(c)(2) protects good faith efforts to screen and block objectionable third-party content, even if such efforts

are incomplete or unsuccessful. The clear congressional purpose behind Section 230(c)(2) was “to encourage service providers to self-regulate the dissemination of offensive material over their services.” *Zeran*, 129 F.3d at 331. However, as the Third Circuit explained, “Section 230(c)(2) does not *require* [interactive computer services] to restrict speech; rather it allows [them] to establish standards of decency without risking liability for doing so.” *Green*, 318 F.3d at 472.

Consequently, Section 230(c)(2) immunizes a website’s decision to adopt some guidelines or rules (such as “members must be eighteen or older”), even if it takes no action to enforce them, because establishing the rules is an act voluntarily taken with the intent of discouraging objectionable content.

The Sixth Circuit should hold that Section 230(c)(2) immunizes any efforts by SexSearch to block content, even if SexSearch fails to fully enforce those efforts or is unsuccessful in doing so. As stated in its Terms, SexSearch requires members to be at least 18 years old, and it reserves the right to terminate any membership for breach of these terms. Congress’s goal for Section 230(c)(2) was to remove disincentives for taking voluntary actions, but Doe’s theory would have the opposite effect because it would penalize SexSearch for articulating any standards or rules in the first place. If SexSearch faces liability for failing to ensure that each of its “terms of service” or other rules are strictly enforced, it will have a very strong incentive to set no rules at all – which would be exactly the

opposite type of incentive that Congress sought to foster in Section 230(c)(2).

Thus, this court should also hold that SexSearch is immunized from Doe's claims under Section 230(c)(2).

B. Section 230 Immunizes a Website Operator from Any State or Federal Claim, Not Only Tort Claims, Which Attempts to Treat It as the Publisher of Objectionable Third-Party Content.

Section 230's broad immunity is not limited merely to defamation, or even to tort claims, but on its face covers "*any cause of action* that would make service providers liable for information originating with a third-party user of the service." *Zeran*, 129 F.3d at 330 (emphasis added). Furthermore, Section 230 states that "[n]o cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section." 47 U.S.C. §230(e)(3). Doe attempts to circumvent Section 230 by alleging that it is the fact that Jane Roe was on the SexSearch website, rather than the false content of her profile, that is at issue. (Appellant Br. 15) Courts, however, have rejected such artful pleading and, instead, have examined the substance of a claim to determine whether it seeks to *treat* a website operator as the publisher of third-party content.

For example, in *Doe v. MySpace, Inc.*, 474 F. Supp. 2d 843 (W.D. Tex. 2007), a 13-year-old girl claimed she was 18 and met an older man through the website, who subsequently sexually assaulted her. The plaintiffs filed negligence and fraud claims against MySpace, arguing that their case "is not based on

MySpace’s posting of third-party content, but rather on MySpace’s failure to institute safety measures to protect minors.” *Id.* at 848. The district court held that Section 230 immunized MySpace because “[n]o matter how artfully Plaintiffs . . . plead their claims, . . . [the] claims [were] directed toward MySpace in its publishing, editorial and/or screening capacities.” *Id.* at 849; *see also Universal Comm’n Sys.*, 478 F.3d at 419 (holding that “immunity extends beyond publisher liability in defamation law to cover any claim that would treat [defendant] ‘as the publisher’”). This principle extends the immunity to any form of claim that would impermissibly treat the website operator as the publisher of third-party information. Hence, in *Gentry v. eBay, Inc.*, the court held that Section 230 preempted plaintiff’s state law claim where its “substance” sought to hold eBay liable for breach of an implied warranty and failure to prevent fraudulent conduct because such a claim would treat eBay as the publisher of third-party misinformation. 121 Cal. Rptr. 2d at 715-16. The court reasoned “holding eBay responsible when it merely made the individual defendant’s false [information] available to other users . . . puts eBay in the shoes of the individual defendants, making it responsible for their publications or statements.” *Id.* at 716.

Other courts have extended Section 230 immunity to contract claims. In *Schneider v. Amazon.com, Inc.*, Schneider argued that Amazon breached its contract when it failed to remove an allegedly third-party defamatory posting

criticizing him. *See* 31 P.3d at 39. An Amazon employee had promised to have the posting removed because it violated Amazon’s comments guidelines. *See id.* at 38-39. The court rejected Schneider’s claim because his “claim is based entirely on the purported breach – failure to remove the posting – which is an exercise of editorial discretion. This is the activity the statute seeks to protect. More important, however, is the fact that §230 does not limit its grant of immunity to tort claims.” *Id.* at 41-42. Likewise, in *Green v. America Online*, the Third Circuit held that Section 230 barred breach of contract claims brought against an interactive computer service for failing to screen objectionable content. 318 F.3d at 470. The court found that AOL had not waived its Section 230 protection in its “Membership Agreement” by reserving the right to remove content. *Id.* at 471. The court noted that the Membership Agreement, in language similar to the Terms on SexSearch.com, essentially followed the terms contained in Section 230, and credited AOL’s disclaimer of any liability arising out of the content provided by members on its service. *Id.* Thus, any attempt to convert the editorial decision whether to allow certain third-party content onto a website into a breach of contract claim to bypass Section 230 immunity should be rebuffed.³

³ Section 230 also has barred claims based on violations of state consumer protection acts. *See, e.g., Corbis Corp. v. Amazon.com, Inc.*, 351 F. Supp. 2d 1090, 1117-18 (W.D. Wash. 2004) (holding Amazon was immune from liability under the consumer protection act because images at issue were provided by a third party and Amazon could not be treated as publisher of images).

In the present case, Doe argued that the “Warning” on SexSearch.com that “all persons on [the] site are 18+ years of age” was a false representation or a breach of contract. *SexSearch.com*, 502 F. Supp. 2d at 729. However, SexSearch’s “Warning” was not a false representation; rather, it was simply a restatement of the representations – that is, the content – of its users. *See Mazur v. eBay, Inc.*, No. C 07-03967 MHP, 2008 WL 618988 (N.D. Cal. Mar. 3, 2008). “[T]o gain access to SexSearch as a member, all potential members must check a box that appears on the webpage, which states: ‘I am over 18, I have read and agree to the terms and conditions and the privacy policy.’” *Id.* at *11 (quoting *SexSearch.com*, 502 F. Supp. 2d at 729). SexSearch, which disclaimed any warranties, based its “Warning” on assurances (content) created by third parties (its members); it did not create this content itself. *See id.* Additionally, as explained above, SexSearch’s failure to remove the false third-party content is a protected editorial decision. Section 230(c)(1), therefore, immunizes SexSearch from Doe’s breach of contract/false representation claim.⁴

This court should deny all of Doe’s attempts to circumvent Section 230. Each of Doe’s claims, regardless of its form, treats SexSearch as the creator of Roe’s content. As the *Zeran* court observed, “[w]hile Congress allowed for the enforcement of ‘any state law that is consistent with [§ 230], 47 U.S.C. §

⁴ Doe’s breach of contract claims also seem to fail because there does not appear to

230(d)(3), it is equally plain that Congress' desire to promote unfettered speech on the Internet must supersede conflicting common law causes of action." *Zeran*, 129 F.3d at 334. Assigning contract or other liability to SexSearch would run counter to congressional intent by forcing similar services to undertake the impossible task of "screening . . . millions of postings for possible problems." *Id.* at 331. Such a result would undermine free speech and the diversity of Internet offerings.

III. THIS COURT SHOULD REJECT DICTA AND HYPOTHETICALS FROM A SMALL MINORITY OF CASES ATTEMPTING TO LIMIT THE BROAD IMMUNITY PROVIDED BY SECTION 230.

As noted earlier, the vast majority of courts, including five circuit courts, have ruled that Section 230(c) broadly immunizes interactive computer services from liability for objectionable third-party content. Although Doe has not expressly raised the issue, his various claims may be interpreted as an attack on broad Section 230(c) immunity. As a result, *Amici* believe it is important to address an outlier Seventh Circuit decision that in express dicta hypothesized that the broad immunity espoused by *Zeran* and its progeny may be wrong. The Seventh Circuit's dicta should be rejected because it misreads the statute, ignores congressional intent, and undermines the protections that have fostered the growth of speech and innovation on the Internet. Furthermore, such an invitation to speculate upon and reconsider widely-accepted case law should be rejected.

be an enforceable contract. *See SexSearch.com*, 502 F. Supp. 2d at 729.

The Seventh Circuit in *Chicago Lawyers' Committee for Civil Rights Under Law, Inc. v. Craigslist, Inc.*, No. 07-11-1, 2008 WL 681168 (7th Cir. Mar. 14, 2008), addressed the issue whether Craigslist is liable under the Fair Housing Act for discriminatory housing ads posted by third parties on its website. The court held that Section 230(c)(1) protected Craigslist because, for it to violate the Fair Housing Act, it would have to be treated as the publisher of the ads. In so holding, the court noted that "Section 230(c)(1) is general" and covers any type of information posted by third parties. *Id.* at *4. The court concluded its opinion by commenting that "given § 230(c)(1) [the plaintiff] cannot sue the messenger just because the message reveals a third party's plan to engage in unlawful discrimination." *Id.* at *5. Rather, the plaintiff can sue the third-party creators of the content. *Id.*

Despite this clear ruling, the Seventh Circuit reiterated express dicta from its earlier decision in *Doe v. GTE Corp.*, 347 F.3d 655 (7th Cir. 2003), which questioned broad Section 230 immunity. The court's dicta brushed aside the plain language of the statute and the explicitly-stated intent of Congress and introduced unnecessary risk to online entities. The Sixth Circuit should ignore these dicta.

In *GTE*, the Seventh Circuit attempted to harmonize the "Good Samaritan" caption of Section 230(c) with text that does not explicitly require such activity. *Id.* at 659-60. However, it is well-established that headings may not limit the plain

meaning of the text and only have interpretive use where the text is ambiguous. *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528-529 (1947). Heading notwithstanding, the plain meaning of Sections 230(c)(1) and (2) is that the former immunizes website operators from liability for third-party content, and the latter immunizes them from good faith efforts to block such content. Indeed, despite reiterating the dicta from *GTE*, the *Craigslist* opinion, written by the same judge, unequivocally stated that the two sections have different purposes: “[S]ubsection (c)(2) does not deal with the liability of speakers and publishers, the subject of subsection (c)(1). We read each to do exactly what it says.” *Craigslist, Inc.*, 2008 WL 681168, at *4.

Furthermore, the hypotheticals and dicta in *Craigslist* and *GTE* would introduce a number of inconsistencies and ambiguities in reading the statute. First, Section 230(c)(1) should not be read as a “definitional” clause, as the Seventh Circuit has intimated given that Section 230(f) explicitly contains statutory definitions. The Seventh Circuit posits that Section 230 immunity turns essentially on Section 230(c)(2) – to get protection a service provider must block or screen. *Id.* at *3 (quoting *GTE*, 347 F.3d at 659-60). However, this interpretation is inconsistent with the plain language of the statute. The congressional findings and policies contained in the statute explicitly addressed more than Good Samaritan issues. Compare 47 U.S.C. §§ 230(a)(1), (3)-(4); (b)(1)-(2), with *id.* §§ 230(a)(2);

(b)(3)-(4). The Seventh Circuit’s “definitional” approach thus would read half of Congress’s findings and policies out of the statute. Moreover, the plain meaning of Section 230(c)(1) grants immunity from liability for third-party content. Second, Section 230(c)(1) should also not be read to permit state law causes of action to narrow its immunity because to do so would render another subsection superfluous. Specifically, Section 230(e) comprises the full set of exceptions to immunity from liability.

Lastly, the Seventh Circuit’s dicta contemplate liability for service providers who have not created the objectionable content but whom the court concludes are not publishers – intermediaries, for example. The Seventh Circuit commented that Section 230(c) would not prevent a suit if a website operator contributorily infringed copyrights by permitting illegal downloading of music – that is, content provided by the direct music infringers.⁵ The court cited *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) to support this view. However, the Seventh Circuit’s invocation of *Grokster*, a copyright case, is entirely misplaced because Section 230(e) explicitly states that the immunity does not limit

⁵ See also *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*, 489 F.3d 921, *reh’g granted*, 506 F.3d 716 (9th Cir. 2007). In express dicta, the Ninth Circuit speculated that where a website operator actively induced offensive content rather than merely facilitating it, the operator “might well be held responsible for creating and developing” the content. 489 F.3d at 928. This panel decision is currently under *en banc* review to resolve inconsistencies with the circuit’s earlier *Carafano* ruling.

any intellectual property laws. Additionally, Section 230(c)(1) expressly states that a website operator shall not be treated as a publisher or speaker of content created by a third party. It is not qualified in any way: It simply looks to who created the content.

Any dicta that are purported to limit the broad immunity contained in Section 230(c)(1) also run counter to the wishes of Congress. Since *Zeran*, Congress has endorsed the broad immunity interpretation of Section 230 by the courts. Beyond mere acquiescence, Congress incorporated Section 230(c) protections for operators directly into the Dot Kids Implementation and Efficiency Act. See 47 U.S.C. § 941(e)(1) (2002). As the committee report adjoining the 2002 legislation stated:

ISPs have successfully defended many lawsuits using section 230(c). *The courts have correctly interpreted section 230(c)*, which was aimed at protecting against liability for such claims as negligence (See, e.g., *Doe v. America Online*, 783 So.2d 1010 (Fla. 2001)) and defamation (*Ben Ezra, Weinstein, and Co. v. America Online*, 206 F.3d 980 (2000); *Zeran v. America Online*, 129 F.3d 327 (1997)).

HR Rep. No. 107-449, at *13 (2002) (emphasis added).

The Sixth Circuit should reject any narrow interpretations of Section 230(c)(1). These interpretations are inconsistent with the plain meaning of the statute and congressional intent. More important, a narrow reading of Section 230(c)(1) risks weakening free speech protections for interactive computer services because they would be less willing to experiment with their website designs and

allow third-party content on their sites. If website operators have to wonder whether their sites are encouraging or inducing certain types of third-party content, or if they have to constantly police the content, they simply may not permit any questionable content at all. Under such a scenario, free speech and Internet development would suffer.

CONCLUSION

Congress enacted Section 230 in 1996 to shield website operators from liability for third-party content provided by millions of users. It viewed this protection as critical to promote free speech and cultivate the potential – both in growth and diversity – of the Internet. Since that time, the Internet has grown exponentially, both in the number of websites and services and, more importantly, in the number of users. There has been an explosion of user-generated content. It is no overstatement to say that Section 230 has played a critical role in fueling the growth of the Internet. But for Section 230, all the concerns about liability in 1996 would be multiplied many times over with today's Internet. Without broad immunity, interactive computer services would have shunned third-party content. There would be fewer websites and less diversity, chilling free speech. Undeniably, there is content on the Internet that many find objectionable. However, as Congress and the vast majority of the courts have recognized, this is a hallmark of true freedom of speech. To focus on extreme content is to miss the

lush and wide spectrum of Internet speech. This court should help ensure the growth of the Internet and the diversity of speech on it by affirming the district court's opinion and holding that Section 230 broadly immunizes interactive computer services such as SexSearch from content created by their users.

Respectfully submitted,

Michael B. Bressman⁶
VANDERBILT LEGAL CLINIC
131 21st Avenue South
Nashville, Tennessee 37203
(615) 322-4964

Attorney for Amici Curiae

Dated: March 28, 2008

⁶ This brief was prepared with substantial assistance from the students in the Vanderbilt Intellectual Property & the Arts Legal Clinic.

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because it consists of 6,912 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5)(A) because it has been prepared in a proportionally-spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Michael B. Bressman
VANDERBILT LEGAL CLINIC
131 21st Avenue South
Nashville, Tennessee 37203
(615) 322-4964

Attorney for Amici Curiae

Dated: March 28, 2008

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of March, 2008, two true and correct copies of the foregoing document were sent via First Class United States Mail to each of the following:

Gary Kaufman
Dana Milmeister
The Kaufman Law Group
1925 Century Park East
Suite 2350
Los Angeles, California 90067

Dean M. Boland
18123 Sloane Avenue
Lakewood, Ohio 44107

Richard M. Kerger
Kerger & Associates
33 S. Michigan Street
Suite 100
Toledo, Ohio 43604

Michael B. Bressman